

Matthew J. Fox, a Fire Fighter with the City of Atlantic City, represented by Louis M. Barbone, Esq., petitions the Merit System Board for interim relief of his indefinite suspension, commencing on March 7, 2006, pending the disposition of criminal charges.

By way of background, on March 1, 2006, the appellant was indicted by a federal grand jury on one count of conspiracy to defraud the United States and five counts of income tax evasion. Specifically, it was charged that, during calendar years 1998 through 2002, the appellant and his wife knowingly underreported their taxable income. According to the indictment, the appellant failed to report approximately \$400,000 of taxable income during the time period in question. On March 7, 2006, the appellant was served with a Preliminary Notice of Disciplinary Action (PNDA) indefinitely suspending him, pending the disposition of these criminal charges. On March 28, 2006, a departmental hearing was conducted pursuant to *N.J.A.C. 4A:2-2.7(a)1*. As a result, on March 30, 2006, the hearing officer, Frank M. Donato, issued a decision to the parties reflecting his decision to continue the appellant's immediate suspension. Donato noted:

I find that the suspension of [the appellant] is necessary to maintain safety, health, order or the effective direction of public services. He is charged by a Federal Grand Jury with defrauding the United States of large sums of money for income taxes. The integrity and trustworthiness of such a firefighter is suspect in that the public must be assured that firefighters who enter their homes and businesses have the integrity to be trusted inside their homes and businesses unsupervised. Without such integrity, safety, health, order and direction of public services breaks down.

Upon receipt of the hearing officer's decision, the appellant filed the instant petition for interim relief.¹ The appellant contends that his indefinite suspension is based solely on a concern with the public perception of his indictment. He argues that there has been no specific evidence presented that he is unfit for duty or will be a hazard to anyone if he is permitted to continue working pending the disposition of the criminal charges. Further, the appellant asserts that the appointing authority's contention that his

¹ It is not clear from the record whether the appellant received a Final Notice of Disciplinary Action in accordance with *N.J.A.C. 4A:2-2.7(a)3*.

indictment impacts safety, health, order or effective direction of public services is speculative in nature. He maintains that he has had an exemplary record of service since his appointment in February 2004, and there has been no convincing evidence that the pending indictment will affect his job performance. Finally, the appellant notes that there is a presumption of innocence that attaches to any criminal indictment.

In response, the appointing authority, represented by Anthony A. Swan, Deputy City Solicitor, argues that the issuance of an indictment “establishes probable cause to believe that the appellant committed the crimes enumerated in the indictment.” It emphasizes that, even if the appellant is acquitted of the charges set forth in the indictment, he may still be subject to administrative disciplinary charges for his conduct. Moreover, the appointing authority avers that the appellant’s indefinite suspension is necessary to maintain the effective direction of public service. It emphasizes that the appellant is charged with serious crimes involving dishonesty, which directly relate to his position as a Fire Fighter. Specifically, the appointing authority echoes the concerns expressed by Donato in his decision, *i.e.*, that the appellant is trusted by the public to enter private homes and businesses unsupervised, and his indictment for crimes of dishonesty negatively impacts the public trust.

CONCLUSION

In reviewing this matter, it is not necessary to address the merits of the criminal charges against the petitioner. Rather, the initial issue to be determined is whether the nature and seriousness of the criminal charges support the necessity for an indefinite suspension. *N.J.A.C. 4A:2-2.5(a)2* provides that an employee may be suspended immediately and prior to a hearing when the employee is formally charged with a crime of the first, second, or third degree, or a crime of the fourth degree on the job or directly related to the job. *See also N.J.S.A. 11A:2-13. N.J.A.C. 4A:2-2.7(a)1* provides that, if requested, an employee who is indefinitely suspended is entitled to a departmental hearing that:

[S]hall be limited to the issue of whether the public interest would best be served by suspending the employee until disposition of the criminal complaint or indictment. The standard for determining that issue shall be whether the employee is unfit for duty or is a hazard to any person if permitted to remain on the job, or that an immediate suspension is necessary to maintain safety, health, order, or effective direction of public services.

In the instant matter, there is no dispute that the appellant has been indicted on one count of conspiracy to defraud the United States and five counts of tax evasion. Whether or not the appellant is ultimately found guilty of the criminal charges is not a matter for the Board to consider at this juncture; that determination appropriately lies with the criminal courts. Rather, it is the Board's role to determine whether the existence of these criminal charges justifies the appellant's indefinite separation from his position as a Fire Fighter until the criminal courts address his guilt or innocence. Clearly, the pending criminal charges are extremely serious. The appellant holds an extremely visible position of trust. The Board has long recognized that Fire Fighters hold very unique positions, and any disregard for the law is unacceptable in a Fire Fighter who operates in the context of a paramilitary organization in which the ability to follow orders is crucial to saving lives. *See In the Matter of Bart Giaconia* (MSB, decided February 22, 2006); *In the Matter of James Alessio* (MSB, decided March 9, 1999). Fire Fighters "are not only entrusted with the duty to fight fires; they must also be able to work with the general public and other municipal employees, especially police officers." *Karins v. City of Atlantic City*, 152 N.J. 532, 552 (1998). The pendency of a criminal indictment against an individual employed to protect and serve the public renders his indefinite suspension necessary in order to maintain the safety of the public and to ensure effective direction of the firefighting services the appointing authority provides. Moreover, the continued employment of such an employee charged with serious crimes of dishonesty cannot be tolerated. To allow the appellant to continue to perform his duties, or even to remain on the payroll, while facing such serious criminal charges could impugn the integrity of the Fire Department. *See also In the Matter of Bart Vallaro* (MSB, decided March 27, 2002); *In the Matter of Rolando Santiago* (MSB, decided August 28, 2001). Finally, since the Board has found that the standards for an indefinite suspension, set forth in N.J.A.C. 4A:2-2.7, have been met, this is the final administrative determination concerning the petitioner's indefinite suspension.

ORDER

Therefore, it is ordered that the appellant's request for interim relief and appeal of his indefinite suspension be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.